RIGHTS OF UNBORN CHILDREN IN THE LAW OF TORTS. — The child *en ventre sa mère* is far from a nonentity.[1] His status both in criminal law[2] and in the law of property[3] is established. But it is equally well established that the reason he may be the object of homicide is not because he is capable of individual rights, but only because of the state's interest in life, and that the reason he is recognized as a person in property depends on special property rules.[4] There is no basis, in either case, from which to draw an analogy in determining the problem whether a child may have a right of action in tort for prenatal injury.

Despite broad statements in decisions to the effect that "to all intents and purposes" the child *en ventre sa mère* is a living person,[5] and despite the favor with which eminent text-writers regard the existence of this right,[6] no action brought by a child in the past for prenatal injury has progressed beyond the demurrer stage.[7] Nor has the child's right obtained better recognition when its administrator has sued under statutes similar to Lord Campbell's Act.[8] Yet, at the same time, the courts have acknowledged that there is a residuum of damage which cannot be accounted for at the suit of either of the child's parents.[9]

It has been said by one writer that there is a recognized duty to abstain from injuring the unborn child quite apart from the duty not to injure the mother,[10] and by a second that every person has a right to bodily integrity at birth.[11] But neither theorist will accord the infant his right of action, the former declaring that there is not for every duty a corresponding right and the latter pleading inexpediency. The novelty of such an action leads a third writer to conclude that only by legislative intervention can the residuum of damage be accounted for.[12] But the statutory solution is easier recommended than obtained. The Japanese Code deems a child *en ventre sa mère* already born with regard to claim-

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See 14 STAT. AT L. 534. The view that such a return would lead to more debtors being forced into bankruptcy by creditors who cannot rely on security given by the debtor, is unsound. For if the creditor honestly thinks the debtor's chances of becoming solvent are good, it would be very foolish to demand a dividend in bankruptcy when forbearance may lead to being paid in full.

[1] "Let us see what this nonentity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian." Buller, J., in Thellusson *v.* Woodford, 4 Ves. 227, 321 (1799).

[2] See 13 HARV. L. REV. 521.

[3] See 20 HARV. L. REV. 651.

[4] See 12 HARV. L. REV. 209.

[5] Per Lord Hardwicke in Wallis *v.* Hodson, 2 Atk. 114, 116 (1740). See also Groce *v.* Rittenberry, 14 Ga. 232, 237 (1853).

[6] See SALMOND, LAW OF TORTS, 5 ed., 394; 1 BEVEN, NEGLIGENCE, 3 ed., 75.

[7] See Walker *v.* Great Northern Ry. Co. of Ireland, 28 L. R. Ir. 69 (1891); Nugent *v.* Brooklyn Heights R. R. Co., 154 App. Div. 667, 139 N. Y. Supp. 367 (1913); Allaire *v.* St. Luke's Hospital, 184 Ill. 359, 56 N. E. 638 (1900); Dietrich *v.* Northampton, 138 Mass. 14 (1884).

[8] Gorman *v.* Budlong, 23 R. I. 169, 49 Atl. 704 (1898); Buel *v.* United Rys. Co., 248 Mo. 126, 154 S. W. 71 (1913).

[9] See Prescott *v.* Robinson, 74 N. H. 460, 463, 69 Atl. 522, 524 (1908); Nugent *v.* Brooklyn Heights R. R. Co., 154 App. Div. 667, 668, 139 N. Y. Supp. 367, 368 (1913).

[10] See MARKBY, ELEMENTS OF LAW, 4 ed., § 132.

[11] See 15 HARV. L. REV. 313.

[12] See 1 UNIV. OF MO. BULL. 42.

ing compensation for damage;[13] but continental law has not progressed so far,[14] and the attempt to introduce in Missouri[15] a similar provision failed.

The step at which courts and legislatures have alike hesitated has been at last taken by a New York judge, who, in a recent case[16] in which the injury to the mother — and thereby, it is alleged, to the infant — resulted from the defendant's negligence, promptly overruled the defendant's demurrer. Is this "progress *pari passu* with advancing civilization"[17] or is it a leap outstripping both law and medicine? The objections to the step, ordinarily lumped under expediency, resolve themselves into two principal difficulties. Is the unborn infant a person? Can causation be established?

First, as to the infant's personality, the question is whether the infant is part of the mother or a distinct person; in brief, whether the mother or the infant should sue. The most original thought on the subject is the dissent of Justice Boggs in *Allaire* v. *St. Luke's Hospital*.[18] His recommendation was that whenever a child was so far advanced in prenatal age that, should natural or artificial parturition occur, the child could live separate from its mother, and is thereafter born and lives,[19] such a child has a right of action for any injuries wantonly or negligently inflicted while in its mother's womb. Before such a time the child is clearly only a part of its mother; but thereafter it is something more. This sensible doctrine of Justice Boggs properly limits the time during which injury to one *en ventre sa mère* is actionable to the period of viability.

But the real difficulty lies in proving medical causation. If science cannot trace the deformity in the born child to the injury to the mother before its birth, it is idle for the law to speculate. This difficulty does not arise where there is negligent injury by direct application of force to the child's body before birth — as by the forceps of the *accoucheur*. Under these circumstances it seems unquestionable[20] that the infant, when born, should have its right of action. And judges have declared themselves disposed, should a case of wanton and wilful injury to the pregnant mother arise, to afford the later-born child his action.[21] But

[13] See JAPANESE CIVIL CODE, art. 721.

[14] See GERMAN CIVIL CODE, § 844; 1 PLANIOL, DROIT CIVIL, 2 ed., §§ 378–380.

[15] See MISSOURI CHILDREN'S CODE COMMISSION, 15 (1917).

[16] Drobner *v.* Peters, 184 N. Y. Supp. 337 (1920). See RECENT CASES, p. 558, *infra*.

[17] See Drobner *v.* Peters, *supra*, 338.

[18] 184 Ill. 359, 368, 56 N. E. 638, 640 (1900). This view is not entirely inconsistent with the authorities which seem to deny a right of action to the child, no matter what his prenatal age. See note 7, *supra*. The Walker and the Nugent cases turned on the question of a contract for carriage. In the Dietrich case the child was not far enough advanced in fœtal life to survive its premature birth, and consequently the case is not within Justice Boggs's rule.

[19] If born dead, the right of action will not survive under Lord Campbell's Act to the child's personal representative, because the difficulty of applying Justice Boggs's rule (that is, of determining whether the child was injured while viable) must be really insurmountable.

[20] Yet where this point arose, since counsel on both sides conceded the right of action for such injury vested in the mother, no decision was taken. See Kirk *v.* Middlebrook, 201 Mo. 245, 285, 100 S. W. 450, 461 (1907).

[21] See Walker *v.* Great Northern Ry. Co. of Ireland, *supra*, 74; Nugent *v.* Brooklyn Heights R. R. Co., 154 App. Div. 667, 668, 139 N. Y. Supp. 367, 368 (1913).

in the case under discussion the alleged injury to the child was indirect and negligent. Even so, it is undeniable that medical science is so far advanced that there are some such injuries which can be unerringly traced by experts into postnatal deformities.[22] In another decade who can say that there shall not be many? At least give the infant his place in court. "It is for [him] to make out his case. If he does so, there is no difficulty. If he does not, there is no liability." [23]

RECENT CASES

AGENCY — PRINCIPAL'S LIABILITY FOR ACTS OF INDEPENDENT CONTRACTOR — INHERENTLY DANGEROUS UNDERTAKINGS. — The defendant employed an independent contractor to erect a brick building abutting on a sidewalk. No barriers or guards were placed to keep the public away. Before the mortar in the front wall had hardened, the wall fell and injured the plaintiff, who was passing on the sidewalk. There was evidence that walls of the kind being built for the defendant are likely to fall before the mortar has dried. *Held*, that the defendant is liable. *Privitt* v. *Jewett*, 225 S. W. 127 (Mo. App.).

An employer is ordinarily not liable for the torts of an independent contractor. *Bailey* v. *Troy & Boston R. R. Co.* 57 Vt. 252. But there are exceptions to the rule; as where the thing contracted for is unlawful, or a nuisance. *Ellis* v. *Sheffield Gas Consumers Co.*, 2 E. & B. 767. Again, if the employer owes a duty to the plaintiff, he cannot escape responsibility by delegating its performance. A clear example is where the duty is imposed by statute. *Gray* v. *Pullen*, 5 B. & S. 970. But the duty may arise differently. Thus where the work to be done is "inherently" dangerous, where injury will probably follow unless precautions are taken, it is said that the employer has a non-delegable duty to see that such precautions are taken. *Bower* v. *Peate*, 1 Q. B. D. 321; *Penny* v. *Wimbledon Urban District Council*, [1899] 2 Q. B. 72; *The Snark*, [1899] P. 74; *Johnson* v. *J. I. Case Threshing Machine Co.*, 193 Mo. App. 198, 182 S. W. 1089. The principal case seems fairly within this exception. Decided cases vary greatly in result. See *Wiggin* v. *St. Louis*, 135 Mo. 558, 37 S. W. 528; *City of Moline* v. *McKinnie*, 30 Ill. App. 419. But this is to be expected; for it is apparent that the language of the courts allows wide discretion in particular cases, and makes for a fair decision of individual controversies, rather than for a certain rule of law.

ANIMALS — TRESPASS ON REALTY BY ANIMALS — TRESPASS BY CHICKENS. — Defendant's chickens trespassed on plaintiff's land and did substantial damage. There was no evidence of negligence on defendant's part. Plaintiff's land was enclosed by a lawful fence; the fencing statute, however, made no mention of fowls. *Held*, that the plaintiff can recover. *Adams Bros.* v. *Clark*, 224 S. W. 1046 (Ky.).

"*Ils ont fait tort quand les bestes vont oustre la terre.*" Y. B. 7 Hen. VII, Mich.

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[22] It may be asked why need the child be a separate entity from the mother at the moment injury occurs. Let us suppose a severe injury to the mother through the defendant's negligence before the child is conceived. As a result the mother's physical condition, generally or specially, is so permanently altered that the subsequently conceived child is born deformed. Obviously this child can have no right of action. The causation is both too intricate and too remote; the opportunity for intervening causes is medically immeasurable.

[23] See 1 BEVEN, NEGLIGENCE, 3 ed., 75.